DISTRIBUTED

APR 17 '84

APR 20 PAGE 2

ORIGINAL

RECEIVED
APR 17 1984
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 83-1297

IN THE

SUPREME COURT OF THE UNITED STATES

Supreme Court, U.S.
FILED
APR 17 1984
ALEXANDER L. STEVAS
CLERK

---

UNITED STATES OF AMERICA,

Petitioner,

vs.

KARL L. DAHLSTROM, et al.,

Respondents.

---

# BRIEF OF RESPONDENT HIRAM E. CONLEY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

---

Merwin D. Grant

BEUS, GILBERT, WAKE & MORRILL
Suite 1000 United Bank Tower
3300 North Central Avenue
Phoenix, Arizona 85012-2506
Telephone: (602) 274-8229
Counsel for Respondent
Hiram E. Conley

## QUESTIONS PRESENTED

Respondent Conley submits that neither of the questions stated at page (I) of the Petition properly arises in this case. The only question which would arise on this record, had the Government chosen to state it, is whether the Court of Appeals erred in finding insufficient evidence to support the conviction.

## TABLE OF CONTENTS


| | Page |
|---|---|
| Opinion Below | 1 |
| Jurisdiction | 1 |
| Statute Involved | 2 |
| Statement | 2 |
| Reasons for Denying the Petition | 5 |
| Conclusion | 10 |


## TABLE OF AUTHORITIES

CASES


| | |
|---|---|
| General Talking Pictures Corporation v. Western Electric Company, Inc., 304 U.S. 175, 82 L.ed. 1273 | 6 |
| Rice v. Sioux City Cemetery, 349 U.S. 70, 74, 99, L.ed. 897, 901 | 5 |
| Scherk v. Alberto-Culver Co., 94 S.Ct. 2449, 2460 (1974) | 10 |
| Southern Power Company v. North Carolina Public Service Company, 263 U.S. 508, L.ed. 413 | 5, 6 |
| United States v. American Ry. Express Co., 265 U.S. 425, 435-36 (1924) | 10 |
| United States v. Brooksby, 688 F.2d 1102, 1104 (9th Cir. 1982) | 8 |
| United States v. Drape, 558 F.2d 22, 26 (1st Cir. 1982) | 8 |
| United States v. Garber, 607 F.2d 92, 100 (5th Cir. 1979) | 9 |
| United States v. Johnston, 268 U.S. 220, 227, 69 L.ed. 925, 926, 45 S.Ct. 496 | 5 |
| United States v. Critzer, 498 F.2d 1160, 1162 (4th Cir. 1974) | 9 |
| United States v. Pomponio, 429 U.S. 10, 12, 97 S.Ct. 22, 23, 50 L.ed.2d 12 (1976) | 8 |


STATUTES, RULES AND REGULATIONS

Revised Rules of the United States Supreme Court


| | |
|---|---|
| Rule 17 | 6 |

United States Code

18 U.S.C. § 371 . . . . . 2, 4, 8

18 U.S.C. § 3237(b) . . . . . 10

26 U.S.C. § 7206 . . . . . 2, 4, 9

26 U.S.C. § 7206(2) . . . . . 8

OTHER

61 Va. L. Rev. 197 Opposing Certiorari In The United States Supreme Court, (1975) . . . . . 7

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

---

No. 83-1297

UNITED STATES OF AMERICA,

Petitioner,

vs.

KARL L. DAHLSTROM, et al.,

Respondents.

---

# BRIEF OF RESPONDENT HIRAM E. CONLEY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

---

Respondent Hiram E. Conley requests that the petition for issuance of a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit be denied.

## OPINION BELOW

The decision of the Court of Appeals (Pet. App. 1a-18a) is reported at 713 F.2d 1423.

## JURISDICTION

The judgment of the Court of Appeals was entered on August 24, 1983. A petition for rehearing was denied on November 8, 1983. On February 21, 1984, the time to file briefs in opposition to the petition for a writ of certiorari was extended to and including April 11, 1984.

## STATUTE INVOLVED

Section 7206(2) of the Internal Revenue Code of 1954 (26 U.S.C.) provides:

> § 7206. Fraud and false statements
>
> Any person who -
>
> * * *
>
> Aid or assistance
>
> Willfully aids or assists in, or procures, counsels, or advises the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a return, affidavit, claim, or other document, which is fraudulent or is false as to any material matter, whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document;
>
> * * *
>
> shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $5,000, or imprisoned not more than 3 years, or both, together with the costs of prosecution.

## STATEMENT

In 1976, Respondent Dahlstrom started an organization called the American Law Association ("ALA"). Members of the American Law Association purchased memberships and were entitled to receive instructions and materials relating to the ALA tax shelter program. Typically, members attended a two-day seminar. In late October or early November, 1976, Respondent Conley attended a meeting of the ALA at the University of Alaska. (TR 476) The presentation included a discussion on how to avoid probate and the protection of "one's estate through a pure trust organization." (TR 478-79, 494, 95) Conley had shortly before that time met Dahlstrom at a seminar in Seattle. (TR 3609) Subsequent to the meeting in Alaska, Conley traveled to Texas, spent two or three days reviewing the program, and asked for

several cites on court decisions, revenue rulings and code provisions. (TR 3611)

Conley also visited the ALA multi-volume library and even visited the library at the nearby Texas A&M University for the purpose of reviewing the ALA program. (TR 3611)

Conley was also presented with and reviewed a memorandum opinion from attorney Steve Allen (DX A-V) which was a lengthy legal opinion concluding that the ALA program as presented by Mr. Dahlstrom was not in conflict with existing federal tax law. (TR 3614)

Mr. Conley had occasion to review correspondence from attorney Royal Bouschor, II, regarding certain language of the trust organization being utilized by the ALA. (TR 3615) Mr. Bouschor is an attorney who had represented Mr. Conley in the past and who gave advice to Conley regarding the legality of the ALA program. Mr. Conley, on affidavit to the Court, requested authorization for payment of travel funds and fees in order that Mr. Bouschor could testify as an anticipated reliance witness. (TR 3400-07) The court refused such authorization. That refusal was raised as a ground of error in the appeal below. (Res. Br. 43)

Mr. Conley became acquainted with Mr. Neil Nordbrock in April of 1977. Nordbrock was a practicing accountant who spent considerable time with Mr. Conley at various ALA seminars and meetings including meetings held solely for CPA's and lawyers interested in the ALA program. (TR 3704-3705) Tape recorders were generally allowed at all of the ALA meetings and discussions. (TR 2252, TR 3707) Mr. Nordbrock testified as to his conviction that Conley believed the ALA program to be legal.

Respondent Conley was charged with violation of the general conspiracy statute Title 18 U.S.C. § 371 (Count I) and with

violation of 26 U.S.C. §§ 7206 (Counts II, VI, VII).[1] Those indictments resulted from the filing of returns by three individuals who, after some contact with Conley, became members of the ALA, and filed tax returns utilizing the program advocated by the association.

Several members of the ALA testified concerning their attendance and participation in the ALA seminars and regarding the information they had received through the program. (Bean, TR 759-72, Rice, TR 2096-2100, Austin, TR 1667-74, 1698, 1704-16; Rickets, TR 2254-59) Without exception, each stated they had no reason to believe that Conley did not sincerely believe in the legitimacy of the program. Each testified that the tax returns filed had not been seen or reviewed by Mr. Conley. Mr. Conley did not assist anyone in the preparation of a return. (TR 2149)

Undercover agent Walter Perry, acting under the alias of Vince Paoli (TR 1344), tape recorded several telephone conversations[2] and personal meetings with Respondent Conley.[3] Mr. Conley consistently expressed to Mr. Perry his belief that the ALA program was legal.

In early 1982, convictions were returned, sentencing imposed, and an appeal was initiated.

The Court of Appeals vacated the judgment as to all counts. This Petition followed.

---

[1]Durst was charged only in Count I (18 U.S.C. 371, conspiracy) and Count VII (18 U.S.C. 7206). Conviction under Count VII was set aside because the return "was never filed with the IRS [and] never intended to represent Dr. Rickett's true return." (Pet App. 11a) Review is not sought on this issue (Pet App. 8, ftnt. 8) Durst's statements thus become further inadmissible against the alleged co-conspirator. (Pet App. 11a)

[2]Tapes relating to those calls are as follows: (1) 5:35 p.m. 12/6/78 (GX 235-A); (2) 11:16 a.m. 12/9/78 (GX 235-B); (3) 8:10 a.m. 12/12/78 (GX 235-C); (4) 8:07 a.m. 12/15/78 (GX 235-F); (5) 3:31 p.m. 12/15/78 (GX 235-H).

[3]Government Exhibit No. 242 (transcript is 242-A) was played to the jury (TR 1429-32) and dealt with Dr. Rickets trust and the possibility of obtaining future members of the ALA. (TR 1429)

1. NO QUESTION OTHER THAN SUFFICIENCY OF THE EVIDENCE WAS DECIDED BELOW OR COULD BE REVIEWED IN THIS COURT.

This case is not one that requires the exercise of the Court's extraordinary and discretionary jurisdiction. The issues herein, though identified otherwise by petitioner, are factual. Quite simply, this case is a "sufficiency of evidence" case. It is incumbent on the Court to deny hearings on all but the most exceptional cases, otherwise the Court cannot properly exercise its judgment on the merits in those cases in which review is granted. It is axiomatic that this Court's task is to settle legal issues and not factual ones.

The Court has specifically stated, "We do not grant a certiorari to review evidence and discuss specific facts." United States v. Johnston, 268 U.S. 220, 227, 69 L.ed. 925, 926, 45 S.Ct. 496.[4] Mr. Justice Holmes in Johnston, for a unanimous court 50 years ago, summarized the practice of the court in abstaining from exercising actual discretion except where there are "special and important reasons" which imply that the examination of the Court will reach to a problem beyond the "academic or episodic." Rice v. Sioux City Cemetery, 349 U.S. 70, 74 99 L.ed. 897, 901.

In Southern Power Company v. North Carolina Public Service Company, 263 U.S. 508. L.ed. 413, the Court concluded that a writ based upon an alleged "grave question of vital importance" must be dismissed when the court later concluded that the case was one requiring an examination of the sufficiency of the evidence. A unanimous court stated:

> The argument developed that the controverted question was whether the evidence sufficed . . . [is] primarily a question of fact. That is not the ground upon which we granted the petition and if sufficiently developed, would not have moved us thereto . . . . Obviously, it is impossible for us critically to examine so many records before ruling upon applications and we must rely very largely upon preliminary papers.

---

[4]The Court refused review of the Circuit Court's reversal of a jury conviction for tax evasion.

Even though a federal question raised may be of substance in the sense that it may present an "intellectually interesting and solid problem," nevertheless the Court still recognizes that it does not sit for the "benefit of the particular litigant"; ibid. Not only will the granting of a writ not be warranted merely to review the evidence, neither will it be warranted to draw inferences therefrom. General Talking Pictures Corporation v. Western Electric Company, 304 U.S. 175, 82 L.ed. 1273.

A review of certiorari is not a matter of right but of judicial discretion and will be granted only when there are special and important reasons therefore. Rule 17 of the Revised Rules of the Supreme Court.

The Rule in not granting certiorari to review evidence is a wise one and is universally applicable to cases wherein review is sought. Where the only thing in controversy is an appraisal of the facts on which the Supreme Court is asked to make a second guess or substitute its assessment of facts for that of the court below, then such request is in violation of the "special and important reasons" provisions of Rule 17.

The Court of Appeals concluded that the uncertainty and fair debatability of the use of foreign trusts for tax minimization undercut the Government's attempt to prove criminal intent. In addition, other undisputed evidence plainly showed the absence of any knowing violation by Respondent Conley.[5]

Dahlstrom testified that Conley read and reviewed a presentation that included numerous cases, analysis of statutes,

---

[5]The Petitioner argues that the Respondents "knew and understood" that the [ALA program] was illegal because of (1) the advocacy of the use of "copy not" pens, false security numbers, and false names; (2) the use of a statement of noncooperation with the Government; and (3) isolated, damaging statements by Respondent Durst. (Pet. App. 9-10)

Respondent Conley neither participlated in nor was aware of any of these with the exception of the utilization of the statement of noncooperation described above.

treaties, and attorneys' briefs (DX AV), statements and papers which concluded that the ALA program was legal under the tax laws of the United States. (TR 3614) Further, accountants Nordstrom and Mohs both testified that Mr. Conley had discussions with them relative to the program and its validity. The Respondent Conley in forming his belief as to the legality of the program, traveled to Texas, viewed a 7200 square foot building erected by the ALA, utilized a multi-volume library and sought the advice of accountants and attorneys. These actions are not actions of illegal tax protestors or sham promoters. It was eminently reasonable for Respondent Conley to believe in the legality of the program and as the Court of Appeals concluded, there was insufficient evidence to demonstrate that he "willfully violated a known duty."

The Government has not disclosed these and other salient facts which are highly material to the Court of Appeals' conclusion that evidence of intent was lacking.[6]

The Court of Appeals reviewed thousands of pages of testimony, hundreds of pages of exhibits and in excess of twenty hours of electronic tape-recorded conversations.[7] To pass on the Court of Appeals' conclusion, this Court would have to perform that same task of evidentiary review. This Court should not undertake the chore of further reviewing the sufficiency of the evidence.

---

[6]Some commentators believe that the Government historically tends to oversimplify a case both in the interest of economy and as a matter of effective presentation to the court. One commentator concludes that the Government's petitions are often subject to attack on the basis that the court, if it grants certiorari, will face facts different from those set forth in the Solicitor General's petition. Prettyman, Opposing Certiorari In The United States Supreme Court, 61 Va. L. Rev. 197 (1975). That observation certainly applies here.

[7]The entire panel, including Judge Goodwin, who originally dissented (Pet. App. 14a-18a), voted to deny the petition for rehearing and to reject the suggestion for hearing en banc. The full Ninth Circuit Court was advised of the suggestion for rehearing en banc and no active judge of the court requested a vote for rehearing. (Pet. App. 19a)

2. THE DECISION BELOW GAVE FULL CONSIDERATION TO THE ISSUES AND DECIDED THEM CORRECTLY.

The Government plainly mistakes the opinion of Justice Alarcon and Justice Ferguson when it suggests that they hold there can never be an indictment and conviction in "the absence of a prior statute, regulation, or court decision directly establishing the illegality of the scheme." (Pet. App. (I)) In fact, the decision below rests on insufficiency of the evidence as a whole to show intent:

> The dispositive issue in this case is whether the evidence shows that the appellants acted with the specific intent to violate Section 7206(2). (Pet. App. 8a)
>
> . . .
>
> We conclude that proof of the requisite intent . . . is not shown in this Record. (Pet. App. 11a)
>
> . . .
>
> The government's failure to present evidence as to the appellant's specific intent to violate the underlying substantive count requires us to set aside the convictions premised upon 18 U.S.C. § 371. (Pet. App. 13a)

The Court of Appeals correctly assessed the case as one of sufficiency. Petitioner herein alleges that the facts prove that all appellants acted "willfully" in violation of Section 7206; that is, their acts were "voluntary, intentional violations of a known legal duty." United States v. Pomponio, 429 U.S. 10, 12, 97 S.Ct. 22, 23, 50 L.ed.2d 12 (1976); United States v. Drape, 558 F.2d 22, 26 (1st Cir. 1982). The standard set by the Ninth Circuit for a determination of a "willful" violation under the statute "requires proof of a specific intent to do something which the law forbids," and more than a showing of "careless disregard for the truth is required." United States v. Brooksby, 668 F.2d 1102, 1104 (9th Cir. 1982).

In any event, the lower court held that in light of substantial professional opinion supporting the validity of the ALA program, including the opinion of the Government's own expert

witness, it was impossible for defendants to possess the requisite criminal intent. Nothing in the opinion below suggests that only specific on point statutes, regulations, or cases are required in every criminal tax fraud case before intent can be established.

The Government's petition sets up and knocks down a straw man. The Government actually lost its case below because the ALA foreign trust program presented a new and untested interpretation of the tax laws, whose validity was at least debatable.

It is settled that when the law is vague or highly debatable, a defendant -- actually or imputedly -- "lacks the requisite intent to violate it." United States v. Critzer, 498 F.2d 1160, 1162 (4th Cir. 1974). A criminal prosecution under Section 7206 presents:

> [A] tax question [that] was completely novel and unsettled by any clearly relevant precedent. A criminal proceeding . . . is an inappropriate vehicle for pioneering interpretations of tax law. United States v. Garber, 607 F.2d 92, 100 (5th Cir. 1979).

In Garber, evidence was presented that those with whom the defendant dealt had advised her that certain proceeds were taxable and should be reported. She chose not to rely upon them, was convicted, and the court overturned the conviction.

Petitioner would have this Court believe that the decision below conflicts with decisions in other circuits because the decision allegedly holds, as a matter of law, that the "absence of a prior statute, regulation or court decision directly establishing the illegality of the scheme precludes a finding of willfullness as a matter of law." (Pet App. I) At this point we neither concede nor argue the correctness of that proposition.[8] The Court of Appeals made no such holding.

---

[8]Respondent is informed that co-respondents will more fully address the propriety of this question.

3. NUMEROUS ADDITIONAL GROUNDS OF ERROR WERE NOT DECIDED BELOW. RESOLUTION AND CONSIDERATION OF THOSE ISSUES WILL BE UNWARRANTLY BURDENSOME.

If this Court does accept jurisdiction, numerous areas of error presented below must still be determined; many of which may be dispositive. As was recently pointed out by the dissenting Justices in Scherk v. Alberto-Culver Co., 94 S.Ct. 2449, 2460 (1974), respondent has the right to urge any argument that supports the judgment in his favor. See United States v. American Ry. Express Co., 265 U.S. 425, 435-36 (1924). Not only does the respondent have the right to urge reconsideration of contingents rejected below, but also of those matters which were not passed upon by the courts below.

The Court of Appeals below reached its decision based on the sufficiency of the evidence and thus had no need to address the grounds of error submitted by Respondent Conley, which grounds included (1) error relating to the charge to the jury (Ground of Error No. 1a to 1m); (2) error in refusing to grant a motion for change of venue pursuant to 18 U.S.C. 3237(b); (3) error in refusing to authorize payment of travel funds and fees for Mr. Conley's anticipated reliance witnesses; and (4) joinder in grounds of error of other defendants, including, inter alia, exclusion of exhibits and testamentary evidence and inappropriate admissions of other evidence.

Respondent intends to exercise his rights to argue those grounds of error not decided by the Court of Appeals.

## CONCLUSION

The Government's Petition for Certiorari should be denied.

RESPECTFULLY SUBMITTED this 11th day of April, 1984.

BEUS, GILBERT, WAKE & MORRILL

By _____

Merwin D. Grant
Suite 1000 United Bank Tower
3300 North Central Avenue
Phoenix, Arizona 85012-2506
Telephone: (602) 274-8229
Attorneys for Respondents

15.2.19

DISTRIBUTED
APR 17 '84

ORIGINAL

Supreme Court, U.S.
FILED
APR 17 1984
ALEXANDER L. STEVAS
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

APR 20 PAGE 2

---

No. 83-1297

UNITED STATES OF AMERICA,

Petitioner,

vs.

KARL L. DAHLSTROM, et al.,

Respondents.

---

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

---

COMES NOW the Respondent, Hiram E. Conley, by and through his attorney of record, Merwin D. Grant, and pursuant to Rule 46, United States Supreme Court Rules, presents his motion for leave to proceed in forma pauperis, and as grounds therefore, would respectfully show this Honorable Court the following:

I

The Solicitor General, on behalf of the United States, has petitioned this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case. (United States Court of Appeals, Ninth Circuit, No. 82-1138.)

II

That Respondent's attorney of record, Merwin D. Grant, was appointed as counsel for Respondent under the Criminal Justice Act of 1964, as amended, by Magistrate

J. Weinberg, United States District Court, on March 12, 1982.

III

That leave to proceed in forma pauperis was sought in the United States Court of Appeals for the Ninth Circuit and leave was granted.

WHEREFORE, premises considered, the Respondent, Hiram E. Conley, respectfully requests that this Court enter an Order authorizing him to proceed in forma pauperis in this action.

RESPECTFULLY SUBMITTED this 11th day of April, 1984.

BEUS, GILBERT, WAKE & MORRILL

By _____

Merwin D. Grant
Suite 1000 United Bank Tower
3300 North Central Avenue
Phoenix, Arizona 85012
Attorney for Respondent
Hiram E. Conley

(THIS PAGE INTENTIONALLY LEFT BLANK)